

State Personnel Board, State of Colorado

Case No. 99 B 096

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

Charles E. McGarvey, Jr.,

Complainant,

v.

Department of Transportation,

Respondent.

Hearing on this matter was held on June 9, 1999 before Administrative Law Judge G. Charles Robertson at the State Personnel Board Hearing Room, Room B-65, 1525 Sherman Street, Denver, CO 80203.

MATTER APPEALED

Complainant, Charles E. McGarvey, Jr. ("Complainant" or "McGarvey") appeals the disciplinary reduction in pay of 2 steps for a period of 6 months imposed by Respondent, Department of Transportation ("Respondent" or "CDOT").

For the reasons set forth below, the actions of Respondent are upheld.

PRELIMINARY MATTERS

Respondent was represented by Cristina Valencia, Assistant Attorney General, 1525 Sherman Street, 5th Floor, Denver, CO. Complainant was represented *pro se*.

1. Procedural History

The Notice of Appeal in this matter was filed March 15, 1999. Both parties filed timely prehearing statements. Upon an expedited motion to reschedule hearing by Respondent, hearing on this matter was rescheduled from April 29, 1999 to June 4, 1999 for good cause.

2. Witnesses

Respondent called the following witnesses in its case-in-chief: (1) Robert Torres, Southern Regional Director, CDOT; and (2) Mary Dugan, Equal Employment Opportunity Representative, CDOT. Respondent did not present a rebuttal case.

Complainant called himself as a witness in his case-in-chief and Robert Torres, Southern Regional Director, CDOT.

3. Exhibits

The following exhibits were introduced by way of stipulation between the parties:

Exhibit #	Type
1	Disciplinary Action letter 2/26/99
2	Transcript of R8-3-3 Meeting 10/9/98
3	Memo to McGarvey from Torres 3/9/99
4	CDOT Policy 1245.1 Substance Abuse and Drug Alcohol Testing
5	Engineering/Physical Sciences Tech III Announcement
6	Colorado Driver's License System Motor Vehicle History of McGarvey 12/9/98
7	Colorado Driver's License System Motor Vehicle History of McGarvey 9/21/98
8	DMV Record of McGarvey 3/3/99
9	Memo to McGarvey from Torres 9/23/98
10	Request for DMV Administrative Hearing 8/7/98 and 10/9/98
11	E-mail re: CDOT policy re: driver's license
12	Memo to Ex. Director of CDOT to Appointing Authorities 1/29/96
13	Memo to Division Directors from Personnel 8/14/92
14	Memo to District Engineers from R. Clevenger 6/3/91
15	Summons to McGarvey 98-17752

It was also stipulated that the following Complainant's exhibits were contained within Respondent's exhibits and thereby stipulated into evidence: A, B, C, E, F. The admission of Complainant's exhibits D and G were also stipulated into evidence.

Exhibit	Type
D	Motor Vehicle Record 1/7/99
G	Motor Vehicle Record 6/8/99

ISSUES

1. Whether the act for which discipline was imposed occurred;
2. Whether the discipline imposed was within the range of reasonable alternatives;
3. Whether the appointing authority acted arbitrarily, capriciously, or contrary to rule or law.

FINDINGS OF FACT

(parenthetical refer to exhibits or witness' testimony)

I. Respondent's Background

1. CDOT is the state department charged with maintaining the state highways. As part of its organizational structure, CDOT divides itself by six (6) regions throughout the state. (Torres).
2. Robert Torres is a regional director at CDOT. He is responsible as manager of design, construction, and maintenance of all facilities in southern Colorado. (Torres).
3. In the course of his management responsibilities, Torres is required to supervise employees. In addition, he is responsible for imposing corrective actions and disciplinary actions within his region. Torres participated in a management certificate program which provided him with training with regard to corrective actions and disciplinary actions. (Torres).
4. In the past, Torres has had the opportunity to directly supervise Complainant. He also knew Complainant from participating in sports activities such as basketball outside of employment. (Torres).
5. As a regional director, Torres was familiar with the position held by Complainant, that of engineering/physical science technician III (PST III).

6. The position required that an employee in this position have an active Colorado driver's license in good standing. (Exhibit 5). This is a result of an employee in this position having to drive to various sites to participate in the testing/inspection of soils, concrete, and asphalt. An individual in this position has to monitor various construction sites located in different geographic areas. (Exhibit 5, Torres).
7. Because of staffing considerations, there was no direct supervision of Complainant on an hour to hour basis. In other words, Complainant was responsible for completing his job responsibilities while not being constantly watched during his shifts.
8. CDOT employs an equal employment opportunity officer ("EEO officer") in the southern region of Colorado. The position is currently held by Mary Dugan. Her duties include assuring labor and contract requirements on projects, conducting initial investigations into labor disputes, assuring employee equal employment opportunity/civil rights are upheld in the course of employment, and participating in grievances/corrective and disciplinary actions.
9. In the course of performing her duties, Dugan has attended between 50-100 R8-3-3 meetings involving the potential need for discipline.
10. CDOT 's Policy 1245.1 became effective October 24, 1994. This policy addressed the issue of Substance Abuse and Drug and Alcohol Testing. Its declared purpose is to establish departmental procedures for incorporating the Colorado Substance Abuse Policy and ensuring conformance to the Omnibus Transportation Employees Testing Act. The policy specifically outlines prohibitions:

All CDOT employees are subject to the Colorado Substance Abuse Policy. This policy prohibits the use of alcohol, other drugs, or controlled substances that result in job impairment. . . .

(Exhibit 4). The policy further provides that a violation of the policy, and thus the Colorado Substance Abuse Policy, may result in corrective or disciplinary action.
11. CDOT has a history of maintaining policies regarding the need for employees to maintain driver's licenses in good standing. (Exhibits 14, 13, 12).
12. CDOT employees, on occasion, attend manufacturer/supplier events. In the evening hours, subsequent to daily activities, the sponsors of such

events would provide hospitality suites. Alcohol was often served in these suites. (Torres).

II. Complainant's Background and Incidents Leading to Disciplinary Action

13. Complainant is an employee of CDOT in the southern region. He is a PST III. (Torres, McGarvey).
14. On August 4, 1998, Complainant was scheduled to work from approximately 5:30 a.m. to 3:00 p.m. His lunch break was normally approximately ½ hour. (McGarvey).
15. On August 4, 1998, Complainant and some unidentified co-workers went to lunch. During lunch, Complainant consumed two beers. (McGarvey, Exhibit 2).
16. Complainant acknowledges that he was having a difficult time in his personal life as result of family and financial problems. (Exhibit 2, McGarvey).
17. Complainant was using a state vehicle during his work day of August 4. (Torres).
18. After lunch, sometime near the end of his shift, Complainant returned to his office to exchange his state vehicle for his personal vehicle. (Torres, Exhibit 2, McGarvey).
19. Complainant subsequently returned to the bar, met some other friends, and consumed additional alcohol. (McGarvey).
20. At approximately 7:30, while returning home, Complainant was involved in an automobile accident. At such time, he was cited with being in violation of driving a vehicle with excessive alcohol on his breath, following to closely, and driving under the influence. (Torres, McGarvey, Exhibit 1, Exhibit 9).
21. Subsequently, on or about September 23, 1998, Torres received information through an anonymous note that Complainant had been involved in an accident involving alcohol. (Torres).
22. An R8-3-3 meeting was noticed and scheduled for October 9, 1998. (Exhibit 9). The meeting was called to address concerns about Complainant having a valid driver's license as a result of being involved in an accident involving alcohol.

23. The R8-3-3 meeting was convened on October 9 and in attendance at the R8-3-3 meeting was Dugan, Torres, and Complainant. (Exhibit 2, Dugan, Torres, McGarvey).
24. Complainant admitted to having 2 beers during lunch. He also stated that he had no prior convictions and that he had received a temporary license valid for 60 days. (McGarvey).
25. Torres directed Dugan to gather information on Complainant's previous driving record. (Torres, Dugan).
26. Dugan's initial research indicated that Complainant had a previous conviction of a DUI in 1994. She made this conclusion after researching Complainant's driving record with the Colorado Dept. of Motor Vehicles ("DMV"). (Dugan, Torres).
27. Relying in part on Dugan's research, and based on the information collected at the R8-3-3 meeting, Torres issued a disciplinary action to Complainant on February 26, 1999 consisting of a two-step reduction in pay for 6 months. The grounds for imposing discipline included (1) failure to meet efficient standards of service or competence, and/or willful misconduct. This action was based on Complainant drinking during normal business hours and driving a state vehicle after consuming alcohol. (Torres). Torres believed that drinking while "on the job" posed a safety risk to the employee, other employees, and the public. (Torres, Dugan). Torres also felt such action was willful given that employees had notice of policy 1245.1. (Torres).
28. The disciplinary action was not based on the DUI charge but, rather, on information obtained while investigating the DUI charge. Such information was disclosed by Complainant. (Torres). Torres did not consider Complainant's performance specifically. (Torres).
29. Torres considered mitigating and aggravating factors in deciding whether or not to impose discipline. He indicated that the previous conviction was at least one aggravating factor. He considered Complainant's personal crises as a mitigating factor. (Torres, Exhibit 1). He also considered the levels of discipline appropriate including options such as termination, suspension, leave with out pay, reduction in pay, etc. (Torres).
30. Torres was also aware that other employees who had been drinking while on duty as a CDOT employee had been disciplined for consuming alcohol. (Torres, Dugan).
31. The delay in issuing the disciplinary action was the result of an employee shooting at the CDOT office in Greeley and its impact on CDOT.

32. Subsequently, it was discovered that Dugan misinterpreted the DMV report indicating that Complainant had a previous DUI conviction. Complainant did not have a previous conviction. (Exhibit 3, Dugan, Torres, McGarvey).
33. As a result, on March 9, 1999, Torres issued a memo to Complainant indicating that a mistake had been made in interpreting the driving record. It was also noted that despite the misinterpretation, the discipline imposed would remain unchanged.
34. At no time did Complainant lose his driving privileges. (Exhibit D, G, McGarvey).
35. State Personnel Board Rule R8-3-1, 4 CCR 801-1 (1998) provides in part:

The decision to correct or discipline an employee shall be governed by the nature, extent, seriousness and effect of the act, error or omission committed; the type and frequency of previous undesirable behavior; the period of time that has elapsed since a prior offensive act; the previous performance evaluation of the employee; an assessment of information obtained from the employee; any mitigating circumstances; and the necessity of impartiality in relations with employees. . .

In the case of a certified employee, unless the conduct is so flagrant or serious that immediate disciplinary action is appropriate, corrective action shall be imposed before resorting to disciplinary action.

DISCUSSION

I. INTRODUCTION

Certified state employees have a property interest in their positions and may only be terminated for just cause. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule R8-3-3, 4 CCR 801-1 (1998) and generally includes: (1) failure to comply with standards of efficient service or competence; (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment; (3) willful failure or inability to perform duties assigned; and (4) final conviction of a felony or any other offense involving moral turpitude.

In this disciplinary action of a certified state employee, the burden of proof is on the employer, **not the employee**, to show by a preponderance of the evidence that the acts or omissions upon which discipline was based occurred and just cause existed so as to impose discipline. *Department of Institutions v.*

Kinchen, 886 P.2d 700 (Colo. 1994).

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held that:

Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including: the opportunity and capacity of a witness to observe the act or event, the character of the witness, prior inconsistent statements of a witness, bias or its absence, consistency with or contradiction of other evidence, inherent improbability, and demeanor of witnesses. Colorado Jury Instruction 3:16 addresses credibility and charges the fact finder with taking into consideration the following factors in measuring credibility:

1. A witness' means of knowledge;
2. A witness' strength of memory;
3. A witness' opportunity for observation;
4. The reasonableness or unreasonableness of a witness' testimony;
5. A witness' motives, if any;
6. Any contradiction in testimony or evidence;
7. A witness' bias, prejudice or interest, if any;
8. A witness' demeanor during testimony;
9. All other facts and circumstance shown by the evidence which affect the credibility of a witness.

II. Parties' Arguments

Respondent argues that this is a very simple case. In this instance, as a result of receiving anonymous information, an R8-3-3 meeting was held to determine if Complainant had a valid driver's license. During the course of the R8-3-3 meeting, Complainant admitted to having been in an accident involving alcohol while on his way home. In the course of that investigation, Complainant admitted that he consumed two beers during lunch, while being responsible for a state vehicle. Respondent maintains that Complainant was appropriately disciplined for violating CDOT's policy. Moreover, Respondent argues that the level of discipline imposed was within the range of reasonable alternatives available to the appointing authority and in compliance with the Board's rule on progressive discipline.

Complainant argues that the discipline imposed was not in conformance with Board rules on progressive discipline. Complainant also argues that because of the mistake made by Dugan and Torres in interpreting the DMV

record, the investigation was flawed and that no discipline should be imposed. Complainant also notes that other employees involved in driving after having consumed alcohol were subject to different levels of discipline. Finally, Complainant argues that after it was discovered that he did not have a previous DUI conviction, the discipline imposed should have been lessened based on Respondent relying upon such information as an aggravating factor.

III.

In this matter, Respondent is required to demonstrate by a preponderance of the evidence that Complainant committed the act for which discipline was imposed, that the discipline imposed was within the range of reasonable alternatives, and that the appointing authority did not act in arbitrarily, capriciously, or contrary to rule or law.

A. Act for which Discipline was Imposed

CDOT's alcohol and substance abuse policy primarily relates to employees who maintain commercial driver's licenses. However, the first prohibition listed in the policy applies to ALL employees of CDOT and prohibits the use of alcohol resulting in job impairment. Complainant admitted to having consumed 2 beers during lunch. Complainant consumed alcohol during lunch, returned to work, and in so doing drove a state vehicle. Complainant as a CDOT employee had notice of the prohibitions against drinking and returning to work with his ability impaired. While no specific evidence was introduced demonstrating actual impairment, it is a fair conclusion that Complainant was under some level of impairment after having consumed 2 beers during his lunch. Thus, Complainant willfully failed to follow CDOT policy. Such an analysis is supported in *Bishop v. Dept. of Institutions, Div. Of Youth Services*, 831 P.2d 506 (Colo. App. 1992). *Bishop* provides that the Board may interpret its own rules, and thereby determine if there is willful misconduct, despite an agency not having a specific policy defining or contemplating all types of conduct which are prohibited. Such is the case here in which it is apparent that the behavior constitutes willful misconduct because (1) CDOT stresses concerns about alcohol abuse as demonstrated by its policy and (2) Complainant's conduct, while not specifically contemplated in the administrative policy, was generally within the rubric of CDOT policy.

B. Level of Discipline Imposed

State Personnel Board rules state that progressive discipline is to be imposed. In this instance, Respondent applied this concept. Board Rule R8-3-1 provides that in determining the imposition of corrective or disciplinary action a number of criteria should be considered. In this case, it is clear that the appointing authority considered the seriousness of the act by acknowledging that Complainant admitted to having consumed alcohol and then driving a state

vehicle. It is also clear that the appointing authority considered whether or not any previous or similar behavior by Complainant had occurred. Initially, it was believed that Complainant had been previously guilty of drinking and driving. But, upon additional information, it was determined and acknowledged by Torres that no previous acts had occurred in the course of employment. Torres did not consider Complainant's performance. Yet, he did consider all the information provided by McGarvey as demonstrated by the amendment to the disciplinary action. Also, in determining the level of discipline, Torres did consider impartiality in relation to other employees of CDOT. Torres considered what he deemed mitigating factors, such as the pressures on Complainant as a result of family and fiscal problems.

The issue which needs to be primarily addressed in weighing the above criteria in this instance is how serious is it to drink during one's lunch hour, get into a state vehicle, and drive that state vehicle. CDOT determined this to be a serious act. This is exemplified in its policies on alcohol and substance abuse. That being said, it is certain that the discipline imposed was within the range of reasonable alternatives. The act was generally serious enough to warrant discipline but not to such an extent as to warrant termination. A range existed of possible types of discipline and the appointing authority demonstrated that he had considered such a range of alternatives. This was supported by Dugan's testimony.

C. Arbitrary, Capricious, or Contrary to Rule or Law

CDOT did not act in an arbitrary or capricious manner. In fact, it acted responsibly by investigating information that led it to believe that Complainant may have been involved in abusing alcohol while on the job. Respondent provided appropriate notice to Complainant. Moreover, as demonstrated by its conclusion and revised disciplinary action accounting for the misinterpretation of DMV records, Respondent collected information, weighed such information, and imposed an appropriate level of discipline. Respondent did not neglect or refuse to use reasonable diligence and care in procuring evidence. The DMV records were merely misread. By way of the appointing authority, it gave candid and honest consideration of the evidence and information produced in the course of its investigation. Finally, given the admissions of Complainant, Respondent acted in such a way that reasonable men could not fairly or honestly reach contrary conclusions. See: *Van de Vegt v. Board of Commissioners of Larimer County*, 55 P.2d 703 (Colo. 1936).

CONCLUSIONS OF LAW

1. Complainant did engage in the acts for which discipline was imposed.
2. The discipline imposed was within the range of reasonable alternatives available to the appointing authority.

3. The actions of the appointing authority were not arbitrary, capricious, and contrary to rule or law.

ORDER

Respondent's disciplinary action is UPHELD.

Dated this 26th
Day of July, 1999.

G. Charles Robertson
Administrative Law Judge